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HAROLD B. WILLEY,

IN THE

Supreme Court of the United States

No. 356 October Term, 1954

MOTOR FREIGHT EXPRESS,
YORK MOTOR EXPRESS COMPANY,
BUCH EXPRESS, INC.,
YORK TRANSPORTATION COMPANY, INC.,
PETERS TRANSPORTATION CO., and
LANCASTER TRANSPORTATION COMPANY,
Appellants

v.

UNITED STATES OF AMERICA,
INTERSTATE COMMERCE COMMISSION and
BRANCH MOTOR EXPRESS COMPANY,
Appellees

JURISDICTIONAL STATEMENT

JAMES H. BOOSER,
Commerce Building,
300 North Second Street,
Harrisburg, Pennsylvania,
Counsel for Appellants.

SAMUEL A. SCHRECKENGAUST, JR.,
JEFFERSON C. BARNHART,
of Counsel,
Commerce Building,
300 North Second Street,
Harrisburg, Pennsylvania.

Murrelle Printing Company, Law Printers, 201-3 Lockhart St., Sayre, Pa.

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v.

UNITED STATES OF AMERICA,
INTERSTATE COMMERCE COMMISSION and
BRANCH MOTOR EXPRESS COMPANY,

Appellees

JURISDICTIONAL STATEMENT

To the Honorable the Chief Justice, and the Associate Justices of the Supreme Court of the United States:

Appellants respectfully pray that this Court review with briefs on the merits and oral argument, a decision of the United States District Court for the Middle District of Pennsylvania, wherein the District Court dismissed the Complaint of the Appellants.

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OPINION BELOW

The Opinion of the District Court is reported in 119 F. Supp. 298, and is appended hereto.

JURISDICTION

The present appeal is taken from the final order of the United States District Court for the Middle District of Pennsylvania dismissing the complaint of appellants which requested that court to set aside by injunction two orders of the Interstate Commerce Commission in a civil action pursuant to 28 U.S.C. §§ 2321-2325. The proceeding before the Commission in which the said orders issued involved the "grandfather clause" in 49 U.S.C. § 306(1) and 49 U.S.C. § 308(a).

This appeal is brought pursuant to 28 U.S.C. § 1253.

The said order of the district court was dated and entered on February 17, 1954. A timely motion for rehearing was denied by the District Court on May 26, 1954.

On July 24, 1954, Notice of Appeal to the Supreme Court of the United States was filed in the said District Court.

The provision of 28 U.S.C. §1253 which is believed to confer jurisdiction on this Court reads as follows:

> "Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocu-

tory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges."

The following cases are believed to sustain the jurisdiction of this Court over the instant appeal:

United States v. Baltimore & O. R. Co., 333 U.S. 169, 171, 68 S. Ct. 494, 495;

Alton R. Co. et al. v. United States et al., 315 U.S. 15, 62 S. Ct. 432;

United States v. Carolina Freight Carriers Corp., 315 U.S. 475, 62 S. Ct. 722;

Howard Hall Co. v. United States, 315 U.S. 495, 62 S. Ct. 732.

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QUESTIONS PRESENTED

1. Did the commission misapply and misconstrue Section 206(a) of Part II of the Interstate Commerce Act in concluding that the operations of a motor carrier applicant for grandfather authority were "bona fide", when the commission also found that the very same operations were unauthorized and the commission's examiner further found that for years such lack of authority was known to the applicant carrier?

2. Are the commission's findings legally insufficient or contradictory?

3. May grandfather motor carrier rights be granted on, or in the teeth of, a finding that the applicant's witnesses could not specifically recall any shipments over the routes in question?

4. Are allegations in a grandfather application under Part II of the Interstate Commerce Act a substitute for evidence in granting or clarifying grandfather authority after 1950 in contradiction to the commission's own findings in 1938 denying the authority thus claimed?

5. Were existing certificated carriers denied due process of law or subjected to arbitrary action by the commission's failure to pass on a fundamental issue of laches, in this purported clarification after 1950, giving important, highly competitive grandfather rights, originally denied in 1938 to an applicant which had for years, until after the destruction of material records, sat idly by?

STATEMENT

Appellants brought an action in the district court to set aside two orders of the Interstate Commerce Commission, insofar as they authorized Branch Motor Express Company, hereinafter called Branch, to render motor common carrier service at the cities of York and Lancaster, Pennsylvania, as intermediate points on its two direct routes between Baltimore, Maryland, and Reading, Pennsylvania, duplicating authority appellants have long held from the Commission. One of the orders, hereafter called the grandfather order, was issued by the Commission on March 17, 1952, in a grandfather "clarification" proceeding.

That proceeding was begun upon application of Branch in 1950 for reopening and clarification of its grandfather authority originally determined by order of the Commission in 1938, for the purpose, inter alia, of determining "whether applicant is entitled to serve all intermediate points on its authorized routes." The 1938 order had determined that Branch, in accordance with the "grandfather clause,"[1] was in bona fide operation as a

---

[1] 49 U.S.C. § 306(1):

> . . . no common carrier by motor vehicle shall engage in any interstate or foreign operation on any public highway, . . . unless there is in force with respect to such carrier a certificate of public convenience and necessity issued by the Commission authorizing such operations: Provided, however that . . . if any such carrier or predecessor in interest was in bona fide operation as a common carrier by motor vehicle on June 1, 1935, over the route or routes or within the territory for which application is made and has so operated since that time . . . except in either in-

common carrier on June 11, 1935, and continuously thereafter over two direct routes between Baltimore and Reading, and at certain intermediate points on these routes, which points were specifically listed. York and Lancaster were not so listed as authorized intermediate points.

Upon reopening, after hearings, the Commission's hearing examiner on January 17, 1951, made the ultimate finding in accordance with the "grandfather clause" that "applicant was on June 1, 1935, and continuously since that time has been in bona fide operation . . . and serving all intermediate points (in lieu of specified intermediate points) on the routes defined in its certificate . . ." This ultimate finding rested on a basic finding that Branch's proof of such operation was insufficient, but that reliance should be placed on its original application made in 1936 prior to the Commission's original determination in 1938:

> "Though the recorded evidence at further hearing is not sufficient, the issues in the proceeding are such that resort must and should be had to the basic

---

stance as to interruptions of service over which the applicant or its predecessor in interest had no control, the Commission shall issue such Certificate without requiring further proof that public convenience and necessity will be served by such operation, if application for such certificate was made to the Commission as provided in Paragraph (b) of this section and within one hundred and twenty days after October 1, 1935 . . ."

49 U.S.C. § 308(a):

"Any certificate issued under section 306 or 307 of this title shall specify the service to be rendered and the routes over which, the fixed termini, if any, between which, and the intermediate and off-route points, if any, at which, and in case of operations not over specified routes or between fixed termini, the territory within which, the motor carrier is authorized to operate; . . ."

'grandfather' application in order to reach a determination."

Another basic finding of the examiner concerned laches of Branch in waiting until 1950 to seek "clarification" of its rights, when the lack of authority was known to Branch in 1943, and when in the prior reopening proceedings in 1944, the Branch representative stated that no additional points were sought. In the latter year 1944 all records concerning the grandfather operation in question were stated to have been destroyed by flood, and were therefore unavailable at the hearing here pertinent in 1950.

The Commission's order of March 17, 1952, likewise concluded that Branch should have grandfather authority for all of the 102 previously unauthorized intermediate points on all of its routes in 5 states including the cities of York and Lancaster on the two routes between Reading and Baltimore. It made a basic finding that Branch already had authority for many intermediate points, and that:

> "The general testimony presented by applicant's witnesses is too indefinite to establish 'grandfather' rights in respect to any of the 102 intermediate points not now authorized to be served. However, *there is specific evidence* that applicant has been rendering a service continuously since prior to the critical date to and from 17 of the 102 intermediate points not now authorized to be served . . ." (Italics ours).

It concluded that if a sufficient number of intermediate points on a route have been served, authority should be granted to serve all points on that route.

The Commission made specific findings concerning the two Baltimore-Reading direct routes. It found that Lan-

caster and York were not hitherto authorized intermediate points on these routes. It also found:

> "Applicant has transported shipments from Baltimore to York since prior to the 'grandfather' date over its route through Philadelphia, but *its witnesses did not recall specifically* any shipments that were handled by it prior to the critical date from Baltimore over any direct route to York or any other Pennsylvania point." (Italics ours).

The ultimate finding, in terms of the grandfather clause, insofar as relevant here, was that applicant was on the critical grandfather date, and continuously since, in bona fide operation at the points of Lancaster and York over the direct routes between Baltimore and Reading.

Concerning the reliance on Branch's original application, it found:

> "True, statements contained in the 'grandfather' application itself have no probative value, but the application necessarily must be considered for the purpose of ascertaining the scope of the claimed 'grandfather' rights."

No finding was made concerning laches.

Petitions for reconsideration were thereafter denied by the full Commission, and the Complaint before-mentioned was filed in the district court.

The second order of the Commission, hereafter called the complaint order, issued on December 19, 1952, in two complaint proceedings, complaining of Branch's unauthorized shipments from Baltimore to York and to a point in the vicinity of York. After consolidated hearings, the

hearing examiner concluded that at the time the shipments were made, Branch had no authority to serve York as an intermediate point directly from Baltimore, but that because Branch had meanwhile acquired this authority in the concurrent grandfather "clarification" proceedings, no cease and desist order should issue. The Commission reached the same conclusion, and thereafter petition for reconsideration was denied by the full Commission, whereupon the Complaint before-mentioned was filed in the district court.

The district court in its opinion appended hereto, concluded that the Commission properly found statutory grandfather service had been rendered at York and Lancaster on the two Baltimore-Reading routes, as "an inference based upon probabilities of fact." It found that such inference rested on two bases:

> (a) Branch has operated over each of the two routes for a long time, and consistent with natural business aggression would attempt to serve all intermediate points thereon.
>
> (b) Branch in the 1950 hearings has proved service at a number of points on these two routes.

It should be noted in connection with (b) that none of the 17 points which the Commission found to have been proved at the 1950 hearings were proved as intermediate points on the two routes in question.

With reference to the specific finding of the Commission concerning the two Baltimore-Reading routes, that *there were shipments* prior to the "grandfather" date from Baltimore to York *via Philadelphia*, but that the

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witnesses did not recall specifically any shipments prior to that date from Baltimore *over any direct route to York or any other Pennsylvania point*, the Court concluded that this was not a finding that there were no such shipments, but rather that the evidence was too indefinite to establish grandfather rights at the disputed points of Lancaster and York.

Although the Commission made no finding concerning laches, and the only agency finding on that point is that of the Examiner referred to above, which was that Branch was aware of the deficiencies in its certificate in 1943, the Court concluded:

> "Nor do we think that Branch can be charged with such laches as to deprive the commission of the power to act in this case. One can hardly be said to have delayed unreasonably in acquiring rights which he justifiably believed he had acquired years ago. Branch's clarification petition was filed shortly after its operating rights were questioned."

Concerning reliance on Branch's original application by the Commission, the Court found:

> "The order, read as a whole, however, convinces us that the application was alluded to only to set the scope of the issues before the Commission and to show the obvious justification for Branch's asserted assumption that its original certificate authorized service at the now disputed points."

ARGUMENT

The instant appeal presents to this Court for the first time the question of the extent of the Commission's power, and the statutory standards to be applied, in its redetermination and enlargement, many years after its original determination, of grandfather rights over regular routes, under the "grandfather" clause of 49 U.S.C. § 306 and 49 U.S.C. § 308. More particularly the question is, where the Commission specifically finds disproof or failure of proof of shipments on the statutory grandfather date at hearings 15 years after the date, may it rely on substitutes for such proof, including inferences based on the extent of authority originally determined, operations since the grandfather date, the presumption that unauthorized operations would be performed during those years, and claims asserted in the application, preceding its original determination.

This Court, in a series of decisions made in the late thirties and early forties, reviewed original determinations by the Commission of motor carrier grandfather authority, and the statutory standard to be applied. It construed the statutory test of "bona fide operations." It found that this phrase carried the connotation of substantiality. A holding out to serve is not sufficient. Proof of "actual rather than potential or simulated service" is required. *McDonald v. Thompson*, 305 U.S. 263, 266, 59 S. Ct. 176, 178. Such substantial service actually rendered as distinguished from incidental or infrequent service, may have

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been confined to narrow limits. *Loving v. United States*, D.C., 32 F. Supp. 464, affirmed 310 U.S. 609, 60 S. Ct. 898. Known unauthorized operation is not "bona fide." *McDonald v. Thompson*, 305 U.S. 263, 59 S. Ct. 176.

The proof must be of such "bona fide operation" continuing without interruption from June 1, 1935, down to the time when the Commission authorizes its continuance. *Gregg Cartage & Storage Co. v. United States*, 316 U.S. 74, 62 S. Ct. 932.

This court reviewed original determinations of territorial, as distinguished from regular route grandfather authority in *United States v. Carolina Freight Carrier Corp.*, 315 U.S. 475, 62 S. Ct. 722.

The district court relies on references to the expertness of the Commission in that opinion to justify the Commission's use of inferences inconsistent with the found proof. We do not believe this Court intended that the statutory standards above, most of which were summarized in the same context in the Carolina opinion, might be ignored. Furthermore, it must be assumed that the Commission's original determination was also an expert one, and the Commission's action in setting it aside so readily loses the presumption of correctness.

This decision is of vital concern to all motor carriers holding authority from the Commission. The district court has decided that a different standard of proof may be applied by the Commission in a redetermination of grandfather rights made 14 years later, than that applied in the original determination. It permits the Commission to infer statutory service at points never authorized on a route because the route has been operated during those many years

and some of the other points thereon have been served. The passage of the years which has rendered the proof inadequate, and has given rise to laches, is itself made to support the grant of the additional rights, by being substituted for the proof it has rendered unavailable. The court supplies a finding that Branch was not guilty of laches, although the Commission made no finding on that issue. Furthermore, the inference is based on the presumption that it is natural for motor carriers operating over a route for many years to perform the illegal act of serving the points thereon which it never had authority to serve, together with authorized points.

The Commission's inferences are also permitted to rest on the fact that some other intermediate points on the routes in question were authorized by the original 1938 order. This process of reasoning makes the issue in this proceeding decide the issue. The original order determined that certain points were authorized and certain others were not. The issue in the reopening was whether the ones not authorized should be authorized. That issue is decided by the fact that certain points were authorized.

It is apparent that if this decision is to be followed, all that a motor carrier need do to secure all of the rights from the Commission which it was originally denied, is to wait a sufficient number of years, until records are destroyed and "the mind of man runneth not." The longer the carrier waits, the more inadequate the proof becomes, the stronger the Commission's inference will be, so long as the rights originally denied were originally applied for, and the carrier states that during all of the succeeding years down to the time of "clarification" it thought that it actually held the authority in question.

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Not only are the statutory standards established by this court thus eroded away, but the purpose of the statute is defeated, namely, to secure "that substantial parity between future operations and prior bona fide operations which the statute contemplates." *Alton R. R. v. United States*, 315 U.S. 15, 22 (1942).

Clearly, when grandfather operations are inferred in such cases contrary to a finding of disproof or failure of proof, of such operations, the Commission cannot be mindful of "its responsibility to coordinate the various transportation agencies which constitute our national transportation system. S. Rep. No. 482, 74th Cong., 1st Sess.; H. Rep. No. 1645, 74th Cong., 1st Sess." or "its responsibility to bring greater order and stability to the transportation system than had earlier obtained (S. Doc. No. 152, 73rd Cong., 2d Sess.)" as "an additional reason for its insistance upon a showing of substantial service in that territory which is sought to be covered by a certificate under the 'grandfather clause.' " *United States v. Carolina Freight Carriers Corp.*, 315 U.S. 475, 481, 62 S. Ct. 722, 726. Additional grandfather rights based on the presumption that over the years since the grandfather date a carrier will illegally serve points which the Commission originally determined were not served on the grandfather date, and based on the extent of grandfather service originally determined will result in a more destructive competitive situation than prevailed prior to the statute. The effect would be that, contrary to the Congressional intent, contemplated in *Noble v. United States*, 319 U.S. 88, 92 63 S. Ct. 950, 952:

> "The 'grandfather' clause would be utilized not to preserve the position which the carrier had ob-

tained in the nation's transportation system, but to enlarge and expand the business beyond the pattern which it had acquired prior to July 1, 1935 . . .

If such a metamorphosis is to be effected or if the appellant is to obtain a permit broader than the actual scope of his established business, the showing required by other provisions of the Act must be made. See 7206(a), § 207, and 209(b)."

Finally, the decision of the district court presently appealed from is in substantial conflict with that of the Nebraska District, in *Watson Bros. Transp. Co. v. United States*, 59 F. Supp. 762 (1954). That also was an action brought before the three-judge district court to set aside an order of the Interstate Commerce Commission, insofar as it *denied*, in a grandfather reopening proceeding, certain intermediate points on an authorized regular route of the motor carrier applicant and complainant. The proceedings were pending before the Commission from 1936 until the Commission's order in question in the reopened proceeding issued in 1943. The Court found that plaintiff had after the grandfather date expanded its operation to include these points (773, 779); that denial of the intermediate points would result in an annual loss of several hundreds of thousands of dollars of gross revenue, and that valuable facilities had been installed at the intermediate points in 1939.

Concerning the probative value of such data, that court declared at page 779:

"Besides, the current magnitude of an applicant's operations, except insofar as it contributes to the proof of bona fide *continuance* of operations *after* June 1,

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1935, is no measure of its rights under 49 U.S.C.A. § 306(a). It may, indeed, be highly instructive upon the issue of actual public convenience and necessity if an application be presented for a certificate under 49 U.S.C.A. § 307(a). But that question is not before the court." (Italics ours).

Appellants are faced with this newly authorized and destructive competition, as will the other motor carriers of the nation, if the decision of the district court is applied to future reopenings and "clarifications" of grandfather certificates.

Accordingly, appellants pray that this Court give plenary consideration, with briefs and oral argument on the merits, to the decision of the district court.

Respectfully submitted,

JAMES H. BOOSER,
Attorney for:
Motor Freight Express,
York Motor Express Company,
Buch Express, Inc.,
York Transportation Company, Inc.,
Peters Transportation Co.,
Lancaster Transportation Company,
Appellants,
Commerce Building,
300 North Second Street,
Harrisburg, Pennsylvania.
SAMUEL A. SCHRECKENGAUST, JR.,
JEFFERSON C. BARNHART,
Of Counsel.

APPENDIX

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

Civil Action No. 4789

Motor Freight Express, a corporation, York Motor Express Company, a corporation, Buch Express, Inc., a corporation, New York and Pennsylvania Motor Express, Inc., a corporation, York Transportation Company, Inc., a corporation, New York and New Brunswick Auto Express Co., a corporation, Peters Transportation Co., a corporation, Shirks Motor Express Corp., a corporation, Lancaster Transportation Company, a corporation, Paul W. Hively, an individual, trading and doing business as Miller's Motor Freight Service,

Plaintiffs

v.

United States of America and Interstate Commerce Commission of the United States of America,

Defendants

and

Branch Motor Express Company,

Intervening Defendant.

Coram: Staley, *Circuit Judge*, Watson, *Chief District Judge*, and Murphy, *District Judge*.

OPINION

Staley, *Circuit Judge.*

This court was convened to hear and determine the merits of plaintiffs' claim that two orders of the Interstate Commerce Commission should be set aside.[1] One of the orders was dated March 17, 1952, and issued after a "grandfather" application proceeding at the commission's Docket No. MC-10875. The other was dated December 19, 1952, and resulted from two complaint proceedings at Docket Nos. MC-C-1322 and MC-C-1351. On November 25, 1953, we denied a preliminary injunction. We now decide that there is no fatal infirmity in the challenged orders and that they may not be set aside.

The orders concern the scope of operating authority of Branch Motor Express Company, a common carrier by motor vehicle. Branch intervened and has taken part in the proceedings.[2] Plaintiffs are ten motor carriers who compete with Branch at the points in dispute.

None of the testimony that was taken before the commission was put into evidence here. Therefore, we take the background facts from the trial examiner's report and those of the commission. The history of the litigation is rather involved and goes all the way back to 1936.

On February 10, 1936, Branch[3] filed with the commission two applications under the "grandfather" provi-

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[1] 49 Stat. 548 (1935), as amended, 63 Stat. 479 (1949), 49 U.S.C.A. § 305(g) (1951); 28 U.S.C. §§ 1336, 1398, 2321, 2325, and 2284.

[2] 28 U.S.C. § 2323.

[3] Then called Branch Storage Company, Inc. The name was changed to Branch Motor Express Company on November 13, 1939.

sions of Sections 206(a) and 209(a) of Part II of the Interstate Commerce Act. The application under Section 206(a) [4] of the Act sought a certificate of public convenience and necessity to operate as a motor common carrier of general commodities over certain specified regular routes. At its MC-10875, the commission conducted an informal investigation on this application and, on June 10, 1938, entered a compliance order providing for the issuance to Branch of a grandfather certificate to operate as a motor common carrier of general commodities, with certain immaterial exceptions, and excepting "garments, and materials and supplies used in the manufacture" thereof, over the routes and serving the points requested in the application, including the terminal points and principal intermediate points named, but not specifically including the highway junction points and all intermediate points.

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[4] "Certificate of convenience and necessity—(a) Necessity for; carriers in bona fide operation on June 1, 1935; traffic moving to and from Territories and possessions; 'grandfather' provisions

"(1) Except as otherwise provided in this section and in section 310a of this title, no common carrier by motor vehicle subject to the provisions of this chapter shall engage in any interstate or foreign operation on any public highway, * * * unless there is in force with respect to such carrier a certificate of public convenience and necessity issued by the Commission authorizing such operations: *Provided, however*, That, subject to section 310 of this title, if any such carrier or predecessor in interest was in bona fide operation as a common carrier by motor vehicle on June 11, 1935, over the route or routes or within the territory for which application is made and has so operated since that time, * * * the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation * * *." 49 Stat. 551 (1935), as amended, 64 Stat. 574 (1950), 49 U.S.C.A. § 306(a) (1951).

The other application, under Section 209(a),[5] was docketed as MC-10876 and sought a grandfather permit to operate as a contract carrier of garments between the points applied for in the common carrier application. The matter was put down for hearing, following which the trial examiner issued his report and recommended order. On May 17, 1941, no exceptions having been taken to the examiner's recommended order, it became effective as the order of the commission, authorizing Branch to operate as a common, rather than a contract, carrier of garments. Hence, a certificate was granted to Branch to continue its garment carriage between certain specified points. In June of 1942, the commission issued to Branch a consolidated certificate whose separate paragraphs authorized the operations set out in the orders at MC-10875 and MC-10876.

Branch next appeared before the commission in 1944 and petitioned to reopen the proceedings at both docket

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[5] "Contract carriers by motor vehicle—(a) Permit to operate; carriers in bona fide operation on July 1, 1935; * * * traffic moving to and from Territories and possessions; 'grandfather' provisions

"(1) Except as otherwise provided in this section and in section 310a of this title, no person shall engage in the business of a contract carrier by motor vehicle in interstate or foreign commerce on any public highway * * * unless there is in force with respect to such carrier a permit issued by the Commission, authorizing such person to engage in such business; *Provided*, That subject to section 310 of this title, if any such carrier or a predecessor in interest was in bona fide operation as a contract carrier by motor vehicle on July 1, 1935, over the route or routes or within the territory for which application is made and has so operated since that time, * * * the Commission shall issue such permit, without further proceedings * * *." 49 Stat. 552 (1935), as amended, 64 Stat. 575 (1950), 49 U.S.C.A. § 309(a) (1951).

numbers in order to determine whether it should be authorized to operate as a common carrier of garments from, to, and between all of the points on the routes as to which it had been authorized to haul general commodities. No exceptions having been taken to the examiner's recommended order, it became effective as the order of the commission. On April 23, 1945, a corrected certificate was issued to Branch which authorized the extended scope of operation requested in Branch's petition. This was the certificate held by Branch when the proceedings were begun which precipitated the present dispute. It did not, nor did any of the prior certificates, specifically list the cities of York and Lancaster, Pennsylvania, among the intermediate points at which Branch was authorized to render service on its Baltimore-Reading routes.

In February of 1950, Branch petitioned for "correction, clarification, reconsideration, or revision" of its certificate. Specifically, it sought a determination that it was entitled to serve all the intermediate points on its authorized routes. The proceeding was opened and a further hearing took place. Motor and rail carriers appeared in opposition, and much evidence was received. From the examiner's and the commission's reports we learn that Branch's 1950 petition for clarification asserted that it had always considered that its certificate authorized service at all intermediate points on its regular routes, whether or not listed therein; that it has, in fact, served all such points since long prior to the grandfather date; but that it had been advised in 1949 that its certificate may not have authorized service at those intermediate points on its regular routes which were not specifically listed; and that, if such were the case, the certificate was faulty. Consequent-

ly, it sought a revision which would definitely state that the service at all intermediate points was authorized. In effect, it claimed no new intermediate-point service rights but asked that the commission specifically approve what it alleged it had been doing since before June 1, 1935.

After canvassing the entire record, the examiner stated:

> "The evidence adduced at the further hearing is not sufficient of its own weight alone to support applicant's present claims. * * *
>
> "Though the recorded evidence at further hearing is not sufficient, the issues in the proceeding are such that resort must and should be had to the basic 'grandfather' application in order to reach a determination.* * *"

He said that the certificate revealed duplicity, ambiguity and confusion. Referring then to the original grandfather application, he noted that, following each route description was a list of "principal intermediate points," among which were not listed the terminal points of the individual highway segments as named in the route description. Attached to the application, however, was the following statement:

> "Wherever in the following route description the expression 'principal intermediate points' is used it should be understood that included therein are also the junction points between highways which are shown * * *."

He felt that this analysis supported Branch's claimed intent to continue service at all highway segment terminal points as well as named intermediate points, even though

those highway segment terminal points were not listed among the intermediate points in the certificate. Lancaster and York were among such highway segment terminal points on Branch's Reading-Baltimore Route No. 38. The examiner then noted that the commission had never required all-inclusive evidence of intermediate-point service in grandfather applications. His ultimate finding followed the statutory formula to the effect that Branch was on June 1, 1935, and continuously since that time has been, in bona fide operation as a common carrier serving *all* the intermediate points on the described routes.

Upon exceptions by the protestants, Division 5 of the commission thoroughly reviewed all the evidence. Its report of March 17, 1952, states that Branch had always considered that it was authorized to serve all intermediate points and that its certificate does not reflect all the operating rights established by Branch and to which it is entitled. Regarding the examiner's resort to the grandfather application, it said that statements therein have no probative value but that the application must be considered in order to ascertain the scope of the claimed grandfather rights. As to Branch's burden of proof, it said that the testimony was too indefinite to establish grandfather rights at any of the intermediate points not then specifically authorized, but it then adverted to its rule that, in order to obtain authority to serve all intermediate points on a regular route, a grandfather applicant need not show service at every point. If a sufficient number of intermediate points have been served, authority to serve all points should be granted. There followed its ultimate finding that Branch was, on June 1, 1935, and continuously since has been in bona fide operation as a motor common carrier

over the routes and in the manner set out in its appendix C, which authorized service at all intermediate points, with exceptions not here material. This, of course, authorized service at Lancaster and York on Branch's Baltimore-Reading routes. The full commission denied petitions for rehearing, and, on May 4, 1953, a revised certificate issued to Branch, authorizing the service set out in the order of March 17, 1952.

The other order attacked issued after two complaint proceedings were instituted against Branch by two of the present plaintiffs. The complaints were that Branch had rendered service at York and vicinity in violation of its 1945 certificate. In an order issued on December 19, 1952, Division 5 of the commission stated that the operations complained of were unauthorized at the time performed, but it declined to issue cease and desist orders because, since that time, Branch's certificate had been revised so that those operations were now authorized. Division 5 then discontinued the proceedings. On July 1, 1953, the full commission denied a petition for reconsideration.

A few preliminary matters should be disposed of at this point in order properly to focus the scope of the issues here.

Since we uphold the commission's action on Branch's application proceeding, we will not again refer to the complaint proceedings, for the validity of the latter turns entirely on that of the former. That is, the commission may not be reversed for declining to issue cease and desist orders against operations that, at the time of the orders, are clearly within the authorization of the erstwhile violator.

Moreover, since plaintiffs have not introduced the transcripts of testimony containing the evidence upon which the commission made its findings of fact, we must conclude that those findings are supported by substantial evidence on the record considered as a whole. "The settled rule is that the findings of the Commission may not be assailed upon appeal in the absence of the evidence upon which they were made." Mississippi Valley Barge Line Co. v. United States, 292 U.S. 282, 286 (1934).

It is understood, of course, that we do not sit de novo in cases dealing with orders of the commission. On the contrary, the scope of review is limited by the doctrine of administrative finality. "Only questions affecting constitutional power, statutory authority and the basic prerequisites of proof can be raised. If these legal tests are satisfied, the Commission's order becomes incontestable." Rochester Telephone Corp. v. United States, 307 U.S. 125, 140 (1939); Mississippi Valley Barge Line Co. v. United States, supra.

Plaintiffs, conceding the validity of the rules stated in the two preceding paragraphs, rely upon the well-established principle of administrative law to the effect that the agency's ultimate finding, usually expressed in the statutory language, must find adequate support in its findings of basic facts. United States v. Carolina Freight Carriers Corp., 315 U.S. 475 (1942); United States v. Chicago, M., St. P. & P.R.R., 294 U.S. 499 (1935). The problem usually found in cases discussing the question of the adequacy of basic findings to support the agency's ultimate finding is that, without a reasonably clear exposition of the agency's basic findings, the court is unable intelligently to exercise

its reviewing function or cannot be sure that the agency has not gone beyond its jurisdictional power or has not departed from its statutory authority. That is not our problem. From an examination of the commission's order, we are not left with any doubt as to what the commission has done and why it has done so. Our problem, then, is to determine whether there is statutory authority for revising a grandfather certificate upon the basis of the factors which the commission employed in this case.

An applicant for a grandfather certificate need not prove public convenience and necessity; he is entitled to a certificate, as a matter of right, upon proof of substantial bona fide operations on and continuously since the statutory date. Gregg Cartage & Storage Co. v. United States, 316 U.S. 74 (1942); United States v. Carolina Freight Carriers Corp., 315 U.S. 475 (1942); McDonald v. Thompson, 305 U.S. 263 (1938). Thus, when Branch acquired its original certificate, it did so upon the basis of sufficient pre- and post-statutory operation, regardless of the question of public convenience and necessity. Plaintiffs contend that the same rules should govern the disposition of Branch's 1950 petition for clarification of its grandfather certificate, that is, that the burden was on Branch to show substantial operations at Lancaster and York on its Baltimore-Reading routes, on and continuously since June 1, 1935. This, according to plaintiffs, Branch failed to do, because both the examiner and the commission found that the evidence was insufficient to support Branch's claimed right to a grandfather certificate authorizing service at Lancaster and York. With that as a basic finding, it is said that the commission cannot, consistently with logic, make the required, ultimate finding that Branch has served

Lancaster and York, on its Baltimore-Reading routes, on and since the statutory date. Therefore, the order must be set aside.

We disagree. It is true that the examiner and the commission stated, in effect, that the evidence of Branch's operations adduced at the 1950 hearing in and of itself was insufficient to establish its right to grandfather authorization at each of its intermediate points. The commission went on, however, to its rule that, in order to obtain authority to serve all intermediate points on its regular route, it is not necessary that a grandfather applicant show service at every point, but if a sufficient number of such points have been served, authority to serve all should be granted. That rule is the heart of this case, and there is no doubt of its applicability here, for the commission found that of a total of 430 intermediate points on the 42 routes described in Branch's 1945 certificate, service was specifically authorized at 76 per cent of them, and that the evidence at the further hearing showed sufficient operations at 17 more, or 80 per cent of them. Since the testimony is not before us, we must take those findings at their face value. Indeed, plaintiffs do not dispute the validity of those findings. We turn then to whether that rule and its use here is within the commission's statutory authority. If it is, the ultimate finding is adequately supported and cannot be set aside.

We think that what the commission did here and has done before, Riss & Co., 44 M.C.C. 704 (1945); Richards, 27 M.C.C. 489 (1941); Pierce Auto Freight Lines, 11 M.C.C. 417 (1939), is no more than what courts do every day. Reduced to its essentials, the so-called rule in ques-

tion is no more than an inference based upon probabilities of fact. It is a shorthand expression of a process of reasoning. The commission, as the fact finder and upon substantial evidence on the whole record, determines that a carrier has been operating over a particular route since the early thirties, serving as a common carrier of general commodities at a certain number of intermediate points on that route and, consistent with natural business aggression, has attempted to carry all that is offered to and from all the points on that route. Its direct, positive evidence, however, at a hearing held fifteen years after the statutory date, is sufficient to prove definite service at only a certain number of the points on the route. The rule in question then comes into play and is a tacit statement by the commission to the effect that, since the applicant has operated over this route for a long time and has definitely proved service at a number of points, we will infer that it has served all points. Plaintiffs' supplemental brief seems to concede the propriety of drawing such an inference. Complaint is made, however, that it is not properly drawn in a case where the commission has made an express finding that the points were not served. That may be, but we need not decide such a question because here the commission made no such finding. It found that Branch's evidence adduced in 1950 was too indefinite to establish grandfather rights at the disputed points; that the witnesses did not recall specifically shipments from Baltimore over any direct route to the points in question. It did not find that there were no such shipments. It should be pointed out that a flood in 1944 had destroyed Branch's records so that it could not produce documentary evidence of pre-1944 shipments.

We think the commission's use of this logical inference from well-established facts is perfectly consistent with the admonition that, within certain limits, it will be left to work out by its expert judgment the specific variations of the general grandfather authority in order to assure those regulated "that substantial parity between future operations and prior bona fide operations which the statute contemplates." Alton R. R. v. United States, 315 U. S. 15, 22 (1942). In United States v. Carolina Freight Carriers Corp., 315 U. S. 475, 480 (1942), it was said that "The precise delineation of the area or the specification of localities which may be serviced has been entrusted by the Congress to the Commission." The commission's judgment was characterized as "highly expert. Only where the error is patent may we say that the Commission transgressed." 315 U. S. at 482.

The question of the power of an administrative agency to draw inferences from proven facts was settled by Republic Aviation Corp. v. National Labor Relations Board, 324 U. S. 793 (1945). "An administrative agency with power after hearings to determine on the evidence in adversary proceedings whether violations of statutory commands have occurred may infer within the limits of the inquiry from the proven facts such conclusions as reasonably may be based upon the facts proven. One of the purposes which lead to the creation of such boards is to have decisions based upon evidential facts under the particular statute made by experienced officials with an adequate appreciation of the complexities of the subject which is entrusted to their administration . . . . Like a statutory presumption or one established by regulation, the validity,

perhaps in a varying degree, depends upon the rationality between what is proved and what is inferred." 324 U. S. at 800, 804-805. Here there is obviously sufficient rational connection between what the commission found to have been proved and what it inferred.

Plaintiffs argue that, assuming the propriety of the inference, its application here is not consistent with its use in past decisions by the commission. But an agency may change its mind. If the application of the inference here was not improper, we may not be concerned that it may have been applied differently in other cases before the commission. Federal Communications Commission v. WOKO, Inc., 329 U. S. 223 (1946); Virginian Ry. v. United States, 272 U. S. 658, 665-666 (1926).

We are told that error was committed by the reference to Branch's original grandfather application. The order, read as a whole, however, convinces us that the application was alluded to only to set the scope of the issues before the commission and to show the obvious justification for Branch's asserted assumption that its original certificate authorized service at the now disputed points.

Nor do we think that Branch can be charged with such laches as to deprive the commission of power to act in this case. One can hardly be said to have delayed unreasonably in acquiring rights which he justifiably believed he had acquired years ago. Branch's clarification petition was filed shortly after its operating rights were questioned.

We conclude that the commission acted within its

statutory authority and that there is a rational basis for its order. Therefore, the complaint will be dismissed.

(s) AUSTIN L. STALEY,
Circuit Judge

(s) ALBERT L. WATSON,
Chief District Judge

(s) JOHN W. MURPHY,
District Judge

February 17, 1954.